

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 15, 2007

THERESA LYNN PETERS v. ORVILLE LEON PETERS

Appeal from the Chancery Court for Sullivan County
No. B0019564 (L) E.G. Moody, Chancellor

No. E2006-02585-COA-R3-CV - FILED NOVEMBER 30, 2007

Theresa Lynn Peters (“Wife”) filed a complaint seeking a divorce from Orville Leon Peters (“Husband”). Following the trial, the Trial Court divided the marital property and awarded Wife alimony in futuro of \$2,200 per month. Husband appeals challenging the Trial Court's division of the marital property as well as the award of alimony in futuro. Because Husband failed to file either a transcript of the proceedings or a Tenn. R. App. P. 24(c) statement of the evidence, we affirm the judgment of the Trial Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Clifton Corker, Johnson City, Tennessee, for the Appellant, Orville Leon Peters.

David S. Haynes, Bristol, Tennessee, for the Appellee, Theresa Lynn Peters.

MEMORANDUM OPINION¹

In this divorce litigation, Husband appeals the Trial Court's division of marital property, claiming the division was not equitable. Husband also appeals the Trial Court's decision that Wife was entitled to alimony in futuro of \$2,200 per month.

The final judgment was entered by the Trial Court on November 3, 2006, following a plenary trial. Husband was represented by counsel at the trial. On December 1, 2006, Husband, by then proceeding pro se, filed a notice of appeal. Husband did not file a cost bond or a transcript from the hearing. Husband later posted the appropriate bond and this appeal was allowed to proceed. In early June of 2007, Husband retained counsel to represent him on appeal. Husband's attorney then informed the Trial Court and this Court that no transcript would be filed “because there was no court reporter” at trial. No Tenn. R. App. P. 24 (c) statement of the evidence was filed. Tenn. R. App. P. 24(c) provides as follows:

(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. — If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 90 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the statement. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this rule.

Our ability to address Husband's two challenges to the Trial Court's factual findings is severely hampered if not completely eliminated by the absence of either a transcript of the hearing

¹ Rule 10 of the Rules of the Court of Appeals provides: “This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated ‘MEMORANDUM OPINION,’ shall not be published, and shall not be cited or relied on for any reason in any unrelated case.”

or a Tenn. R. App. P. 24(c) statement of the evidence. Since there was no court reporter at trial, Husband was unable to provide a transcript. However, nothing prevented Husband from preparing a statement of the evidence in accordance with the above-quoted rule. Husband had the duty “to prepare a record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal.” *Nickas v. Capadalis*, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997) (quoting *State v. Boling*, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992)). “This court cannot review the facts de novo without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings.” *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992).

There are numerous statutory factors to be considered when equitable dividing marital property and when deciding whether to award alimony. See Tenn. Code Ann. § 36-4-121(c) (2005) (factors to consider when equitably distributing marital property) and Tenn. Code Ann. § 36-5-121(i) (2005) (factors to consider when “determining whether the granting of an order for payment of support and maintenance to a party is appropriate ...”).

Husband argues that this Court can resolve the issues on appeal by relying on affidavits and pleadings filed before the trial and the final judgment entered by the Trial Court. We disagree. This Court has no way of knowing if the testimony of the parties at trial was consistent with their affidavits or if the veracity of the contents of these affidavits was successfully challenged during cross-examination. In short, without a transcript or complete Tenn. R. App. P. 24(c) statement of the evidence, this Court effectively is precluded from undertaking any sort of meaningful review. See *Rowe v. Rowe*, No. E2005-01023-COA-R3-CV, 2007 WL 541813 (Tenn. Ct. App. Feb. 22, 2007), *no appl. perm. appeal filed* (noting that an “award of alimony is factually driven” and without a transcript or Tenn. R. App. P. 24(c) statement of the evidence, we were unable to review the propriety of the trial court's award of temporary alimony).

Wife claims this appeal is frivolous and requests an award of attorney fees incurred on appeal. Exercising our discretion, we decline to award Wife any attorney fees.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Orville Leon Peters, and his surety, if any.

D. MICHAEL SWINEY, JUDGE